CF0000057767

(2)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

Cr. Appeal No. 111 /1995

APPELLANT : Keshav Kumar S/o Dariyab Nishad, aged 20 years, occupation Fruit Seller, village Ranipartevathana Chhura tahsil Gayiyabandistrict Raipur (M.P).

Versus

RESPONDENT : State of M.P. through Police Station Chhura (M.P).

APPEAL UNDER SECTION 374 Cr.P.C.

XI-HC-22

(16)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक CRA. NO. 111 / 95 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH: -
HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. V.K. SHRIVASTAVA, JJ.

22-12-2005

Shri Awadh Tripathi, counsel for the appellant.

Shri Akhil Mishra, Panel Lawyer for the State/respondent.

By this appeal, the accused/appellant has questioned the legality of the judgment of conviction and sentence dated 21-11-1994 passed by the 3rd Additional Sessions Judge, Raipur, in S.T. No.282/93 whereby the learned Additional Sessions Judge after holding the accused/appellant guilty for the commission of offence under Section 302 of the I.P.C., sentenced him to undergo imprisonment for life.

The case of the prosecution, in brief, is that on 7-4-93 the accused and the deceased left together from the house of the deceased and thereafter they consumed liquor. After consuming liquor, at about 11.30 in the night when they were in the village Raniparteva near Siddheshwarnath temple, the deceased and the accused quarreled on the ground that the deceased asked the accused that why he is having relations with his sister. In the said quarrel, the accused caught hold of the deceased with the neck and pressed the neck. When he became unconscious, the accused picked up a stone which was lying there, threw it on the head of the deceased and committed murder of the deceased. Thereafter, the accused himself went to the Police Station and gave a merg intimation Ex.-P/10-A, upon which F.I.R. Ex.-P/10 was registered. Sunil Nema, Sub Inspector, left for the scene of occurrence, after giving notice (Ex.-P/1), prepared Panchnama of the dead body of the deceased under Ex.-P/2. During the police custody, the accused gave a memorandum Ex.-P/9 and in pursuance of that, stone, weapon of offence, was taken into possession under Ex.-P/3 &

[पीछे देखिये

(17)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित —2—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

P/4. The papers which were found in the pocket of the deceased were taken into possession under Ex.-P/5. The site plan was prepared by the Patwari. The recovered articles were sent for the chemical examination to the Forensic Science Laboratory, Raipur under Ex.-P/14 from where report Ex.-P/20 & 21 was received. The stone was also sent for Serologist's report and the Serologist's report is Ex.-P/22. The dead body of Rajesh was sent for postmortem examination under Ex.-P/16-A. The postmortem was conducted by Dr. K.V. Rao, Primary Health Centre, Chhura, District Raipur and he prepared postmortem report Ex.-P/16. After completion of the investigation, charge sheet was filed against the accused in the Court of Judicial Magistrate, 1st Class, Gariyaband.who in turn committed the case to the Sessions Judge, Raipur from where learned 3rd Additional Sessions Judge received the case on transfer for trial.

The prosecution in order to establish the charge against the accused/appellant examined 12 witnesses. On the other hand, the statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the prosecution evidence. Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused, convicted and sentenced the accused/appellant as mentioned in para-1 of this judgment.

We have heard learned counsel for the parties.

The fact of homicidal nature of the death of Rajesh has not been disputed by learned counsel for the accused/appellant. Apart from that, from the evidence of PW-11 Dr. K.V. Rao in which he has stated that the death may be homicidal in nature, it is established that the death of the deceased was homicidal.

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित —3—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

As far as involvement of the accused/appellant in crime in question is concerned, there is no direct or ocular evidence in this case to connect the accused with the murder of the deceased. The whole case is rest on the circumstantial evidence i.e.

(1) the accused and the deceased were last seen together alive.

(2) the blood stained stone (bolder), weapon of offence, was recovered from the place of occurrence at the instance of the accused.

In order to rest conviction based on the circumstantial evidence as per the settled principles laid down by the Hon'ble Apex Court in the matter of **NESAR AHMED VS. STATE OF BIHAR** reported in **AIR 2001 Supreme Court 2416** i.e. in a case based on circumstantial evidence, before the Court can record conviction, it must satisfy itself that circumstances from which an inference of guilt could be drawn have been established by unimpeachable evidence led by the prosecution and that all the circumstances put together are not only of a conclusive nature but also complete the chain so fully as to unerringly point to the guilt of accused and are not capable of any explanation which is not consistent with the hypothesis of the guilt of the accused.

Now, we shall proceed to scrutinize the evidence of the prosecution. PW-5 Rajendra Kumar, brother of the deceased, has stated that one day at about 5 p.m. the accused came to their house and he called his brother who was sleeping. They talked about 5 minutes and thereafter both of them went out. Rajesh did not return to the whole night. Next day morning, Laxman came and informed that the body of your brother is lying near Siddheshwar temple. PW-6 Smt. Belar Rubin, mother of the deceased, has stated that at about 5.30 p.m. accused Keshav came to their house and he called Rajesh. They were talking about Durga Prasad Brahmin and they left the house. Thereafter, Rajesh did

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

not return. A search was made about Rajesh from his friends but his whereabouts could not be traced out. One Chandu, cycle shop owner, informed that he saw Rajesh and the accused going towards the river. In para-5 of her evidence she has stated that 10 days prior to the incident Durga Prasad Brahmin asked her that Rajesh is teasing his daughter, therefore, he be advised, otherwise he will kill him. Her son Rajesh and daughter of Durga Prasad were in love which was known to her. Durga Prasad has said that he has broken the hands and legs of one person of the village, now the turn is of your son. Thereafter, he vacated the house and went to other house. In the cross-examination, she has stated that the daughter of Durga Prasad Brahmin used to send letters to her son. She also suspected Durga Prasad Brahmin behind the crime. PW-7 Chhedilal Dewangan has stated that at about a year back Rajesh was standing near the bus stand. He was all alone and he informed him that he is going to liquor shop, if he wants, he can bring for him on which he gave money to him and he brought one quarter liquor. At about 7 p.m., at that time, he was all alone, and thereafter he left.

The law regarding connecting an accused with the crime based on the last seen theory, as has been held by the Hon'ble Apex Court in the matter of **BODHRAJ ALIAS BODHA AND OTHERS Versus STATE OF JAMMU & KASHMIR** reported in **(2002) 8 SCC 45**, is that;

> "the theory of last seen comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be hazardous to

[पीछे देखिये

(20)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

In the matter of **Subhash Chand Vs. State of Rajasthan** reported in **(2002) 1 Supreme Court Cases 702** the Hon'ble Apex Court has held that;

".....To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime...."

In the matter of **State of Karnataka Vs. M.V. Mahesh** reported in **(2003) 3 Supreme Court Cases 353** the Hon'ble Apex Court has held that:

"..... Merely being seen last together is not enough. What has to be established in a case of this nature is definite evidence to indicate that Beena had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together...."

In view of the above law laid down by the Hon'ble Apex Court, before convicting an accused based on the last seen together theory, the Court is required to ascertain from the legal clinching evidence that the time-gap between the point of time when the deceased and the accused were seen last together alive and the death of deceased must be so close and proximate that an inference regarding the guilt of accused can be drawn and there is

[पीछे देखिये

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

no possibility of coming any third person in between the last seen together and death of the deceased. There must be unerringly clinching legal evidence that should point towards the involvement of the accused in commission of murder. Further it is unsafe to convict a person based on the last seen theory unless the last seen coupled with other circumstances is indicator of the fact that the accused is the author of the crime.

Based on this principle, if we look into the facts of the present case, even though, PW-5 Rajendra Kumar has stated that at about 5 p.m. in the evening the accused and the deceased left together, whereas, PW-7 Chhedilal has stated that at about 7 p.m. the deceased was all alone on the road and he came to him and enquired from him as to whether he should bring liquor for him on which he gave the money and the deceased brought one quarter of liquor for him. PW-11 Dr. K.V. Rao, in para-3 of his evidence has stated that he found the smell of liquor in the intestine of the deceased which shows that the deceased consumed liquor. Therefore, last seen theory in this case cannot be made a basis for connecting the accused with the crime in question for the reason that at about 7 p.m. the deceased was seen all alone by PW-7. Apart from that, PW-6 Smt. Belar, mother of the deceased, has categorically stated that her son was having love affairs with the daughter of Durga Prasad Brahmin and for that 10 days prior to the incident Durga Prasad warned her to advise her son not to indulge in love affairs with his daughter otherwise he will finish him. There is no evidence on record which shows that the accused and the deceased were seen together nearby the place of occurrence.

As far as second circumstance regarding the blood stained stone (bolder) is concerned, the stone (bolder) was recovered from the place of occurrence i.e. from the open place, therefore, it cannot be held that the stone (bolder) was

[पीछे देखिये

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

concealed by the accused, that was only within the knowledge of the accused and it could not have been seen by anybody else. As the recovery is from the open place, therefore, the accused cannot be connected with the recovery of the stone (bolder) at his instance. There is no other evidence connecting the accused with the crime in question. Even in the Serologist's report, it has been mentioned that the origin of the blood could not be ascertained as the blood was disintegrated.

As such, based on the above case laws of the Hon'ble Apex Court, the prosecution has not been able to establish involvement of the accused in the crime in question.

For the foregoing reasons, we are of the considered opinion that the finding of the trial Court convicting the accused/appellant under Section 302 of the I.P.C. cannot be sustained.

In the result, the appeal of the appellant succeeds and the same is allowed. The conviction and sentence imposed on the accused/appellant are set aside. The accused/appellant be set at liberty forthwith, if not required in any other case.

Sd/-
L.C.BHADOO
Judge

Sd/-
Vijay Kumar Shrivastava
Judge

Barve